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Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1268

PATRICIA ROBERTS HARRIS, SECRETARY, United States Department of Health, Education and Welfare,
Defendant-Appellant,

and

Senators JAMES L. BUCKLEY, *et al.*,
Intervenor-Defendants-Appellants,

v.

CORA MCRAE, *et al.*,
Plaintiffs-Appellees.

BRIEF *AMICUS CURIAE* OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK IN SUPPORT OF PLAINTIFFS-APPELLEES, JOINED BY THE STATES OF NORTH CAROLINA AND OREGON, *AMICI CURIAE*

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Interest of the *Amicus*

The *amicus curiae,* Attorney General of the State of New York, pursuant to his responsibilities as chief legal officer of the State under New York Executive Law § 63, has a vital interest in protecting the civil rights of the citizens of the state, particularly those least able to protect themselves—the poor and disadvantaged.

The Attorney General has at least two reasons for interest in the outcome of this case. The state has a direct financial interest in receiving federal reimbursement for medically necessary abortions which are presently covered only by state and local funds. More important, however, the Attorney General is vitally concerned in the outcome because it will profoundly affect the liberty interests guaranteed to poor pregnant woman by the United States Constitution and New York State law.

Since 1970, New York State has assumed a leadership role in protecting the right of each woman to decide whether or not to continue a pregnancy based solely on her own conscience and her doctor's medical advice. The State Legislature then affirmed that "the right of a mature person of sound mind to have personal control over his [sic] body is fundamental." 1969 Annual Report of the Correctional Association of New York, New York Legislative Documents, 193rd Session, 1970, Vol. 5, Doc. No. 91. Faced with the brutal fact that illegal abortions were the single largest cause of maternal death in the United States, the New York State Legislature voted on April 10, 1970, to amend the provisions of Penal Law § 125.05, which defined as criminal abortion performed at any time during pregnancy.* This amendment repealed the criminal sanctions against abortions performed during the first two trimesters of pregnancy. It constituted a clear acknowledgment that the state had no right to interfere in a woman's most personal decision concerning her body and her life. The state's interest in preserving life had to be viewed within the grim reality that the criminal penalties for abortions were forcing millions of women around the country to seek out illegal abortionists in whose hands thousands of them had died. Memorandum of Assemblywoman Constance E. Cook, N.Y. State Legislative Annual, 1970, pp. 240-242.

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* The statute excepted abortions performed in order to save the life of the mother.

Since 1970, the liberalized New York abortion law has contributed to a dramatic reduction in the incidence of maternal mortality. N.Y. Department of Health, N.Y. State Maternal Mortality Study, 1970-1976, June, 1977, p. 1. In particular, for the period 1972-1976, no maternal deaths attributable to illegal abortion procedures were reported in New York State, compared to the two to seven annual deaths attributable to complications from illegal abortion for the period 1960-1972. *Id.* at 14.

This experience bears out the views expressed by Assemblywoman Constance E. Cook in her memorandum in support of the 1970 bill:

> "Since the law prohibiting abortion except to save the life of the woman was first enacted, health care has changed radically. The law was enacted at the time when abortion could prove fatal to the person upon whom it was performed because of lack of aseptic techniques. Historic reasons for the criminal abortion laws are obsolete . . . The medical profession is being unjustifiably inhibited by the present law. Doctors are often forced to choose between ignoring their best medical judgment, or referring the patient to someone who will perform an abortion." N.Y.S. Legislative Annual, 1970, p. 241.

Recognizing the irrationality of forcing this kind of choice upon pregnant women and the doctors providing them with medical care, the New York Legislature has deemed the delivery of *all* medically necessary services, including medically necessary abortions, a matter of important state policy. Even in the face of emergency fiscal crises, the Legislature reaffirmed that "New York has a long, proud history of providing generously for people in need, and the Legislature has no intention of foresaking that history." N.Y. Session Laws of 1976, ch. 76, § 1. Thus, even though the Hyde Amendments have severely restricted

the availability of federal reimbursement for abortions,* New York's medical assistance plan continues to provide state and local Medicaid funds for any abortion found medically necessary by the patient's attending physician. *See* New York Social Services Law §§ 365-a(2), (5) (b) and New York Dept. of Social Services Administrative Directive 77 ADM-69 (August 24, 1977).

The *amicus* New York State Attorney General accordingly views the decision by Judge Dooling below as a vindication of this state's policy of funding medically necessary abortions for indigent women. The *amicus* considers the Hyde Amendments irrational in their purpose and pernicious in their effect—an attempt to incorporate into national policy elements of sex, race and class bias that are utterly repugnant to the aims and ideals of our society. For these reasons, the *amicus* submits this brief urging affirmance of the decision below.

Questions Presented

1. Does the Hyde Amendments' denial of federal Medicaid funding to Medicaid-eligible women for most medically necessary abortions constitute an impermissible burden on a woman's fundamental constitutional right to choose to terminate her pregnancy?

2. Is the Hyde Amendments' prohibition against the use of federal Medicaid funds for most medically necessary abortions an irrational classification which violates the Equal Protection Clause of the United States Constitution?

Statement of Facts

Since June, 1976, Congress has considered and enacted several amendments to the yearly appropriations bill for the Department of Health, Education and Welfare ("HEW") which have sought severely to restrict or eliminate the use of federal Medicaid funds for medically necessary abortions.

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* These restrictions have resulted in a nationwide decrease of nearly 99% in the number of abortions receiving federal reimbursement since 1977.

The first of these enactments, commonly known as the Hyde Amendments, was proposed on June 26, 1976 by Representative Henry Hyde and provided that none of the funds contained in the FY 1977 Labor-HEW Appropriations Bill, H.R. 14232, were to be used to pay for abortions or to promote or encourage abortions. Although passed by the House, this absolute Rider failed to pass the Senate and was sent to the Labor-HEW Appropriations Conference Committee for resolution. Ultimately, a compromise Rider was enacted which prohibited the use of federal Medicaid funds to pay for abortions except where the mother's life was clearly endangered or where the pregnancy resulted from rape or incest. This took effect on October 1, 1976. Section 209 of P.L. 94-439.

On that same day, October 1, 1976, this class action (originally *McRae* v. *Mathews*) was filed in the United States District Court for the Eastern District of New York on behalf of all pregnant Medicaid-eligible women seeking to terminate their pregnancies and all providers of abortion under Medicaid. It sought declaratory and injunctive relief against the Secretary of HEW to prevent implementation of the 1977 Hyde Amendment on statutory and constitutional grounds. The District Court issued a temporary restraining order on October 1, 1976. On October 22, 1976, the Court issued and, on October 29, 1976, reaffirmed, a preliminary injunction against implementation of the Hyde Amendment nationwide. 421 F. Supp. 533 (E.D.N.Y. 1976).*

On June 29, 1977, this Court ordered the judgment vacated and remanded the case to the District Court for reconsideration in light of *Beal* v. *Doe,* 432 U.S. 438, and *Maher* v. *Roe,* 432 U.S. 464 (1977). On remand, additional Medicaid-eligible pregnant women and doctors providing Medicaid-funded abortions in states which had implemented restrictive standards were permitted intervention as plain-

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* The October 22 decision certified plaintiffs' classes of indigent eligible women and abortion providers and permitted intervention as defendants by Isabelle H. Pernicone as guardian *ad litem* and by Senators Buckley and Helms and Congressman Hyde as taxpayers.

tiffs on that date. The injunction was vacated and a new temporary restraining order was issued by the District Court. The temporary restraining order was lifted on August 4, 1977. The Secretary of HEW immediately implemented the 1977 Hyde Amendment.

The 1977 Hyde Amendment was a one-year appropriation. Thus, the debate was soon resumed. On December 7, 1977 the House and Senate passed a compromise abortion amendment which prohibited use of federal Medicaid funds for abortions with three exceptions: where the woman's life was endangered; where she was the victim of rape or incest which had been promptly reported to a law enforcement agency or public health service; or where two physicians determined she would suffer severe and long-lasting physical health damage if the pregnancy were carried to term.

President Carter signed the FY 1978 version of the Hyde Amendment, Section 101 of P.L. 95-205, on December 9, 1977.

On January 26, 1978, Secretary of HEW Califano issued regulations implementing the 1978 Rider. 48 Fed. Reg. 4570, 4832 (1978).

Evidentiary hearings before Judge Dooling in the District Court began August 3, 1977. The trial of several weeks' duration produced a transcript of over 6,000 pages and 800 exhibits.

On January 15, 1980, the District Court, after thirteen months of deliberation, issued a 329-page opinion declaring the Hyde Amendments unconstitutional. Judge Dooling futher issued an order, which he stayed for 30 days to allow an appeal, requiring the federal government to pay its share of the cost of all medically necessary abortions. On February 10, 1980, this Court voted to vacate that stay, and since that time, federal Medicaid reimbursement for medically necessary abortions has resumed.

POINT I

The Hyde Amendments' denial of federal funding for most medically necessary abortions denies Medicaid-eligible women their fundamental right to choose abortion.

A. The District Court's conclusion that the Hyde Amendments prohibit Medicaid-eligible women from obtaining medically necessary abortions is clearly suported by the record.

In *Roe* v. *Wade,* 410 U.S. 113 (1973), this Court, acknowledging its "awareness of the sensitive and emotional nature of the abortion controversy, of the vigorous opposing views, even among physicians, and of the deep and seemingly absolute convictions that the subject inspired," defined its task as "resolv[ing] the issue by constitutional measurement, free of emotion and of predilection," *Id.* at 116. The decision of Judge Dooling in this case, issued after the extensive trial and his lengthy consideration, reflects his recognition of this responsibility and his adherence to the analytical standard established in *Roe.*

The opinion below contains numerous findings of fact which support the court's conclusion that by restricting the use of federal Medicaid funds for abortions, the Hyde Amendments effectively deny medically necessary abortions to poor (*i.e.,* Medicaid-eligible) women. Significant among the court's findings are those which appear at pages 308-9 of the opinion:

> "The evidence requires the finding that by the professional standards of modern medicine adequate and timely treatment of pregnancy includes recourse to abortion, . . . and that the 'life endangerment' and 'severe and long-lasting physical health damage' standards [of the Hyde Amendments] do not include but exclude the greater part of the cases in which the

profession would recommend abortion as medically necessary procedure to safeguard the pregnant woman's health. The evidence requires the finding that the endangerment of the mental health of the pregnant woman, . . . can reach a degree that in professional medical judgment makes abortion medically necessary in the sense of *Doe* v. *Bolton, supra*, 410 U.S. at 192. The evidence justifies the conclusion that pregnancy among younger teenagers, and the constellation of special health problems pregnancy involves for them, make abortion medically necessary over a broader range of instances than in the case of women in their twenties. The evidence warrants the finding that poverty entrains enhanced health risks, nutritional deficiencies, and limitations on access to health care that make the incidence of medically necessary abortion markedly higher among the poor than among those who have the means to maintain well-nourished life and regular health care. Unwantedness itself is a factor deranging the management of pregnancy, and aggravating the risks from otherwise controllable complications. The evidence shows farther that the professional standards of modern medicine accept that grave fetal defect, determined early in pregnancy with a high degree of probability, may make abortion medically necessary in the judgment of a larger part of the medical profession."

In sum, for plaintiffs, this case is not primarily a matter of the *funding* of medically necessary abortions; it is rather a matter of their availability. Faced with that stark reality, the lower court simply followed the teachings of *Roe* and its progeny; because the Hyde Amendments would have the result (which their proponents clearly intended) of effectively prohibiting poor woman from having medically necessary abortions, they are unconstitutional under the terms of *Roe* v. *Wade* and *Doe* v. *Bolton* alone.

Every pregnancy entails risks to the health and well-being of the pregnant woman which the attending physician may be called upon to evaluate in order to determine whether an abortion is necessary. This is " 'a professional judgment that . . . may be exercised in the light of all factors—physical, emotional, psychological, familial, and the woman's age—relevant to the well-being of the patient. All these factors may relate to health.' " *Beal* v. *Doe*, 432 U.S. 438, 442 n. 3 (1977), *quoting Doe* v. *Bolton*, 410 U.S. 179, 192 (1973). Yet the Hyde Amendments on their face exclude most abortions which physicians would find medically necessary.

Dramatic evidence of the result of the foregoing is the overall percentage decline in Medicaid abortions since the Hyde Amendments have been in effect—98.2%. Transcript p. 4874. "The effect of the legislation has been to reduce the number of abortions funded by the [federal] government from about 250,000 to 300,000 annually to a few thousand a year." Opinion p. 158. For Medicaid-eligible women, in short, abortion has been reduced to a crisis intervention procedure. Opinion p. 110.

> "The evidence requires the conclusion that the consequence of the legislation has been at a very minimum to delay abortions with the serious consequences of increasing maternal mortality risks, that the restrictions on funding have in fact caused some resort to illegal abortion, although the extent of that is not measurable, and that in fact Medicaid-eligible women who wish to terminate their pregnancies have no significant alternative to Medicaid for obtaining abortion." Opinion p. 158.*

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* New York's policy of continuing to fund medically necessary abortions pursuant to § 365-a of the New York Social Services Law marks an exception to the "general effect of the federal legislation [which] has been to bring about conformity between state funding and the federal pattern." Opinion p. 158.

The "alternatives" facing a Medicaid-eligible woman who seeks an abortion which, though medically necessary, is not funded under the Hyde Amendments, are grim. As the court below found, "[t]here is no evidence . . . that Medicaid-eligible women have been able to obtain legally induced abortions through any use of their necessarily exiguous 'personal funds,' or at free public hospitals, or through philanthropic assistance, or reduced clinical charges." Opinion pp. 74-75. Illegal abortion and self-abortion, with all their attendant dangers, are obviously acts of desperation; however, women who do not or cannot choose those "options" face increasingly dangerous medical consequences as their unwanted pregnancies advance and the conditions that originally made the abortion medically necessary are aggravated. *See* Opinion pp. 92-95. Moreover, unwanted pregnancy is likely to impair the mental health of Medicaid-eligible women, "producing severe mental disturbance, including suicidal ideation, in the case of patients in trying life circumstances who are already near the limits of endurance." Opinion p. 116.

The evidence considered by Judge Dooling not only warrants, but compels the conclusion reached below. By prohibiting the use of federal Medicaid funds for abortions which are medically necessary according to commonly applied professional standards of diagnosis and treatment, the Hyde Amendments, in practice, deny Medicaid-eligible women access to such abortions even when dictated by their individual pathology and circumstances.

B. The Hyde Amendments are an undue burden on the fundamental right of women to choose to terminate a pregnancy.

The court below found that the Hyde Amendments have the effect of excluding *medically necessary* abortions from the coverage of Title XIX of the Social Security

Act, as amended, 42 U.S.C. § 1396 *et seq.* To the Medicaid-eligible woman, for whom this exclusion constitutes a denial of the choice whether or not to terminate her pregnancy, "it is difficult to imagine a more complete abridgement of a constitutional freedom . . ." *Roe* v. *Wade,* 410 U.S. 113, 170 (1972) (*Stewart,* J., concurring).

This Court established in *Roe* v. *Wade* that the right of a woman to choose abortion is fundamental, founded in the Fourteenth Amendment's concept of personal liberty (as to states) and by implication in the due process clause of the Fifth Amendment (as to the federal government).* *Id.* at 152-3. *Roe* held that until the point of viability of the fetus, approximately at the end of the first trimester of pregnancy, "the attending physician in consultation with his patient, is free to determine, without regulation by the State, that in his medical judgment the patient's pregnancy should be terminated." *Id.* at 163. After viability, the state may promote its interests in both the health of the mother and the potentiality of human life by regulating abortion in ways that are reasonably related to those interests. *Id.* at 163-4.

The right created in *Roe* "protects the woman from unduly burdensome interference with her freedom to decide whether to terminate her pregnancy." *Maher* v. *Roe,* 432 U.S. 464, 473-4 (1977). In *Planned Parenthood of Central Missouri* v. *Danforth,* 428 U.S. 52, 70-71, n. 11 (1976), this Court declared that Missouri's requirement of spousal consent to abortion was such an unconstitutional

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* A women's right to choose abortion is further protected by the First Amendment's guarantee of religious freedom. As Judge Dooling found, the teachings of many religious groups "in the mainstream of the country's religious beliefs" affirm the right of a woman to choose abortion and in fact, as with the Reform and Conservative Jewish teachings, mandate abortion to preserve her health. Opinion pp. 326-328. A woman's right to be at liberty to make this personal decision is "doubly protected when the liberty is exercised in conformity with religious belief and teaching protected by the First Amendment." Opinion p. 328.

obstacle to "the effectuation of [the woman's] and her physician's decision to terminate her pregnancy." *See also, Bellotti* v. *Baird,* 428 U.S. 132, 147 (1976).

"These cases recognize a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion." *Maher* v. *Roe, supra* at 473, *quoting Whalen* v. *Roe,* 429 U.S. 589, 599-600, and nn. 24 and 26 (1977). Without actually prohibiting all abortions, the Hyde Amendments achieve that result for poor women as effectively as if they contained such an explicit prohibition. By excluding the majority of medically necessary abortions from the certifiable categories, the Hyde Amendments compel Medicaid-eligible women to resort to "alternatives" ranging from illegal abortion to mental derangement. By couching the standards for eligible abortions in terms that are foreign to routine medical practice and usage, the Hyde Amendments make it virtually impossible for the attending physician safely to certify that any particular abortion, even though medically necessary, is within the Hyde Amendments' limits.

The factual findings of the court below clearly demonstrate that the Hyde Amendments do not "merely" make the exercise of the fundamental right to abortion difficult for Medicaid-eligible women. *Cf. Maher* v. *Roe, supra.* See *Beal* v. *Doe, supra* at 457, *Marshall,* J., dissenting. Rather, this legislation erects an "absolute obstacle to a woman's decision that *Roe* held to be constitutionally protected from such interference." *Planned Parenthood of Central Missouri* v. *Danforth, supra* at 71, n. 11. "The enactments challenged here brutually coerce poor women to bear children whom society will scorn for every day of their lives." *Beal* v. *Doe, supra* at 456 (*Marshall,* J., dissenting). They violate the Fifth Amendment.

POINT II

The Hyde Amendments' exclusion of federal funds for medically necessary abortions is an irrational classification that denies Medicaid-eligible women equal protection of the laws.

The Hyde Amendments establish a classification within Title XIX of the Social Security Law which distinguishes medically necessary abortions from all other medically necessary procedures. Although there may be no constitutional obligation to provide or pay for any of the medical expenses of this class of women, "when [government] decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations." *Maher* v. *Roe, supra* at 469-70. See *Beal* v. *Doe, supra* at 444-5. To the extent that the Hyde Amendments alter and contradict Title XIX's objectives, as stated in 42 U.S.C. § 1396, by withholding medical assistance to meet the costs of medically necessary abortions, they fail to comply with constitutional standards.

This Court has previously held that "[t]he constitutionality of such distinction [between abortion and other procedures] will depend upon its degree and the justification for it." *Bellotti* v. *Baird, supra* at 149-50. The evidence presented at trial in this case clearly established that Medicaid-eligible women "have no significant alternative to Medicaid for legal abortions." The "degree" of the distinction effected by the Hyde Amendments, therefore, is, to all intents and purposes, absolute. The rational "justification for it" is nonexistent.

Unlike the state legislation upheld by this Court in *Maher* v. *Roe, supra,* and *Beal* v. *Doe, supra,* the Hyde Amendments do not involve constitutionally permissible restrictions or the funding and availability of non-thera-

peutic, "elective" abortions. The Hyde Amendments are devastating because of their impact on the availability of *medically necessary* abortions. Opinion p. 290. These consequences bear no relation to the purpose of Medicaid, which is to assist the states in providing medical services to individuals "whose income and resources are insufficient to meet the costs of *necessary medical services* . . ." 42 U.S.C. § 1396 (emphasis added). Instead, the Hyde Amendments compel attending physicians to exercise their professional judgment on the basis of standards which are devoid of medical meaning and preclude consideration of all of the factors that are medically relevant to a proper evaluation of the pregnant woman's health and well-being.*

The classification established by the Hyde Amendments is unrelated to any attempt to insure proper standards of medical care. The language of the Hyde Amendments not only imposes improper limits on the attending physician, it does not even include risks to the woman's mental health or the likelihood of grave fetal defects as eligible bases for funding.

The current Hyde Amendment's requirement that abortions necessary for victims of rape or incest will be funded only "when such rape or incest has been reported promptly to a law enforcement agency or public health service" is particularly irrelevant to any legitimate standards of health care. Conditioning funds for abortions in these instances on prompt reporting, which has no relationship whatsoever to medical necessity, is an example of the arbitrary, misogynistic bias inherent in the Hyde Amendments.

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* *Cf.* the finding below that "the opinion current in the medical world was that abortion-related deaths were in large part attributable to illegal induced abortions, and that *the general availability of legal abortion services* after the 1973 decisions [in *Roe* and *Doe*] *radically reduced* [*maternal*] *mortality* due to illegal induced abortion. *See, e.g.*, W. Cater & R.W. Rochat, Illegal Abortions in the United States: 1972-1974, in Family Planning Perspectives, Vol. 8, No. 2, March-April 1976 (DHEW reprint)." Opinion p. 11 (emphasis added); *see also* Opinion pp. 9-10.

These considerations are especially significant in the case of the statutory class of adolescents at a high risk of pregnancy found by the court below to be a "suspect class." Opinion p. 315; 42 U.S.C. § 300a-21(a). In New York, by virtue of this state's liberal abortion laws and continued state Medicaid funding of medically necessary abortions, the number of abortions performed on pregnant women age nineteen and below exceeded the number of live births in each of the years from 1976 to 1978, indicating the degree of unwanted pregnancies among this class. See N.Y. Dept. of Health, Vital Statistics of New York State, published annually in 1976, 1977 and 1978, Tables 20-21 (1976 and 1977 editions) and 21-22 (1978 edition). The court below, considering the Congressional findings expressed in 42 U.S.C. § 3—a-21(a) and studies conducted by the Department of Health, Education and Welfare, as well as extensive testimony at trial, found that pregnancies not only entail greater risks to an adolescent's physical and mental health than that of older women, but also are less susceptible to successful outcomes even when comprehensive prenatal care—uncommon in this group—is obtained. Opinion pp. 134-44.

The court below commented that Congressional proponents of the restrictions ultimately included in the Hyde Amendment "left nothing to debate, for their view was that abortion was the taking of human life and, therefore, not debatable." Opinion p. 164. Recognition of this reality is essential to an understanding of the only purpose reasonably related to the classification established by the Hyde Amendments: the elimination of abortion through the imposition of statutory obstacles that in practice preclude most Medicaid-eligible women from exercising their fundamental right to choose abortion. This Court rejected similar obstacles in *Roe* v. *Wade, supra, Doe* v. *Bolton, supra,* and *Planned Parenthood of Central Missouri* v. *Danforth, supra; see Maher* v. *Roe, supra* at 473. So, too, should it reject the unconstitutional classification created by the Hyde Amendments.

CONCLUSION

For the above-stated reasons, the decision of the United States District Court for the Eastern District of New York should be affirmed.

Dated: New York, New York
March 17, 1980

Respectfully submitted,

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